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No. 84-1498

In the Supreme Court of the United States

OCTOBER TERM, 1984

IN RE
GOOD HOPE CHEMICAL CORPORATION,
DEBTOR,

GOOD HOPE CHEMICAL CORPORATION
CREDITORS' COMMITTEE,
PETITIONER,

v.

KOERVER & LERSCH,
RESPONDENT.

On Petition for Writ of Certiorari to
the United States Court of Appeals for the First Circuit

BRIEF IN OPPOSITION TO PETITION FOR CERTIORARI

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Question Presented

Should this Court review the decision of the Court of Appeals that Section 63c of the now repealed Bankruptcy Act (11 U.S.C. 103(c)) does not affect the date for converting a particular creditor's claim in this Chapter XI proceeding from foreign currency to dollars?

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BRIEF IN OPPOSITION TO PETITION FOR CERTIORARI

The respondent Koerver & Lersch submits this brief in opposition to the petition of the Good Hope Chemical Corporation Creditors' Committee (the "Committee") for a writ of certiorari to the United States Court of Appeals for the First Circuit.

Statement of the Case

Koerver & Lersch is a West German manufacturing concern[1] whose claim in the Chapter XI proceeding of Good Hope Chemical Corporation ("Chemical") is the subject of this case. The issue before the United States Court of Appeals for the First Circuit was the proper exchange rate to be used in converting the allowed claim of Koerver & Lersch from West German marks to United States dollars. The Court of Appeals, applying the "breach day rule" of *Hicks* v. *Guinness*, 269 U.S. 71 (1925), held that the exchange rate to be used was that in effect on May 9, 1980, the date on which Chemical's contract with Koerver & Lersch was rejected by confirmation of Chemical's Plan of Arrangement. *See* Opinion of the Court of Appeals, *reprinted in* Appendix to the Committee's Petition for Certiorari, at A-14. The Plan of Arrangement specified that Chemical's executory contracts would be rejected effective as of confirmation. (A-12 n. 7).

The Court of Appeals rejected the Committee's contention that now repealed Section 63c of the Bankruptcy Act of 1898, 11 U.S.C. §103(c) (1976)[2] (hereinafter "Section 63c"), required that the date of breach relate back to October 31, 1975, the date on which Chemical filed its Chapter XI petition. (A-12-14). The Court of Appeals held that the rationale of the "relation back" rule of Section 63c "has no applicability to the conversion rate issue." (A-13-14). The Committee now asks this Court to review the applicability of Section 63c to the facts of Koerver & Lersch's claim.

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[1] Koerver & Lersch is not a corporation.

[2] The Bankruptcy Act of 1898 was repealed by Bankruptcy Reform Act of 1978, which enacted the Bankruptcy Code. Pub. L. No. 95-598, § 401, 92 Stat. 2549, 2682 (1978). The Bankruptcy Act of 1898, however, continues to govern all cases commenced thereunder, which "shall be conducted and determined under such Act as if [the Code] had not been enacted." Pub. L. No. 95-598, § 403(a), 92 Stat. 2549, 2683 (1978). The instant case, which was commenced in 1975, is governed by the Bankruptcy Act.

Reasons for Denying the Writ

I. The Committee's Petition Presents No Question of Federal Law Which Requires Resolution by This Court.

The only issue presented for review in the Committee's petition is the Court of Appeals' decision that a particular section of the Bankruptcy Act was inapplicable to the calculation of Koerver & Lersch's claim in this proceeding. In reaching this decision, the Court of Appeals relied on the factual background of Chemical's Chapter XI proceeding, noting that "[h]ere the breach was complete, and the compensable loss incurred, only when the contract was rejected on May 9, 1980, not before." (A-13). The Court of Appeals made no ruling as to the applicability or interpretation of Section 63c in any other context. Nor does the Committee suggest any universality to the underlying fact pattern, so as to commend this case to this Court's attention. Indeed, the Committee has cited no other case raising the exchange rate issue in the context of a Chapter XI proceeding, nor is respondent aware of any.

In any event, Section 63c itself has since been repealed. The Bankruptcy Reform Act of 1978, which repealed the Bankruptcy Act and replaced it with the new Bankruptcy Code, *see* note 2, *supra*, does not carry forward the wording of Section 63c which was before the Court of Appeals in this case. While certain provisions of the Bankruptcy Code may be similar to Section 63c, *see* Petition at 7, those provisions differ in language and legislative history and were not addressed by the Court of Appeals herein.

II. There Is No Conflict Between the Decision of the Court of Appeals in This Case and Any Decision of Any Other Court of Appeals or of This Court.

The basis of the Committee's petition is a claimed conflict between the decision of the Court of Appeals for the First Circuit in this case and the decisions of other federal courts. However, examination of the cases relied upon by the Committee readily reveals that no such conflict exists.

A. *The Court of Appeals' Interpretation of Section 63c Does Not Conflict With* Workman *or* Bildisco.

The Committee suggests that the First Circuit's interpretation of Section 63c somehow conflicts with the decision of the Tenth Circuit in *Workman* v. *Harrison*, 282 F.2d 693 (10th Cir. 1960), and with the decision of this Court in *NLRB* v. *Bildisco and Bildisco*, 104 S.Ct. 1188 (1984). However, those cases in no way conflict with the Court of Appeals' decision; in fact, they are simply not pertinent to the issue in this case.

In *Workman* v. *Harrison*, 282 F.2d 693 (10th Cir. 1960), the Tenth Circuit was called upon to determine the rights of a shopping center promoter against the bankruptcy estate of a corporate financier who had orally agreed with the promoter to provide financing in exchange for certain services. The court found that the oral agreement was a valid contract whose rejection by the trustee in bankruptcy constituted a breach and entitled the promoter to assert a claim against the estate. *Id.* at 699. However, the court rejected the promoter's claim to the land on which the shopping center was to have been built, holding that under Section 63c the promoter's claim was instead limited to the value of his contract at the time of the filing of the bankruptcy petition. *Id.* at 699.

NLRB v. *Bildisco and Bildisco*, 104 S.Ct. 1188 (1984), did not involve Section 63c at all. There this Court considered the issues of whether a collective bargaining agreement was an

executory contract subject to rejection in a case under Chapter 11 of the new Bankruptcy Code, and whether such a rejection constituted an unfair labor practice under the National Labor Relations Act. The Court ruled that a collective bargaining agreement was an executory contract which could be rejected by a debtor in possession, and that the rejection would relate back to the date immediately preceding the date of filing. *See id.* at 1198-99.

In both *Workman* and *Bildisco*, the "relation back" issue was peripheral and did not directly bear on the primary questions presented. Neither case poses any conflict with the decision of the Court of Appeals herein, which found the "relation back" rationale irrelevant to the factual circumstances and legal issue before it. (A-12-14).

B. *The Decision of the Court of Appeals Correctly Interprets, and Does Not Conflict With,* Hicks *v.* Guinness.

Nor does the Court of Appeals' decision, as the Committee would suggest, conflict with the decision of this Court in *Hicks* v. *Guinness*, 269 U.S. 71 (1925). In that case, this Court considered the conversion of damages from foreign currency to dollars in a breach of contract case.[3] The Court held that a

[3] The Court of Appeals chose the so-called "breach day rule" of *Hicks* v. *Guinness* over the "judgment day rule" of *Deutsche Bank Filiale Nurnberg* v. *Humphrey*, 272 U.S. 517 (1926), because Koerver & Lersch's claim against Chemical arose under American law. (A-6-12). However, the Court of Appeals' decision that the controlling exchange rate is that in effect on May 9, 1980, is correct under either rule: May 9, 1980, the date of confirmation of the Plan of Arrangement, which the Court of Appeals correctly recognized as the date of breach, can also be viewed as the date of judgment. *See Miller* v. *Meinhard-Commercial Corp.*, 462 F.2d 358, 360 (5th Cir. 1972) (confirmation of plan of arrangement by bankruptcy court "has the effect of a judgment rendered by a district court"). The Plan of Arrangement provided that executory contracts would be rejected effective as of confirmation. (A-12 n. 7). This and other provisions of the Plan of Arrangement, upon confirmation, became binding upon all creditors of Chemical, as well as upon Chemical itself. *See* Bankruptcy Act of 1898, § 367(1), 11 U.S.C. § 767(1) (1976).

claim of an American creditor against a German debtor should be converted from marks to dollars as of the date of breach, the date "upon which . . . liability becomes absolute as fixed by law." *Id.* at 80.

The Court of Appeals in the instant case correctly applied the *Hicks* decision to the factual circumstances of Chemical's Chapter XI proceeding. As the Court of Appeals noted, Chemical refused to reject its contract with Koerver & Lersch, and to relieve Koerver & Lersch of its obligations thereunder, until May 9, 1980, the date on which the contract was rejected upon confirmation of Chemical's Plan of Arrangement. (A-3-4, 13). Thus, the first date on which Chemical had an enforceable obligation to Koerver & Lersch was May 9, 1980. Therefore, the Court of Appeals ruled that, under *Hicks* v. *Guinness*, the date as of which Koerver & Lersch's claim should be converted from marks to dollars was May 9, 1980. (A-12-14). Section 63c of the Bankruptcy Act did not affect this conclusion, since a "fictional" relation back of the breach date by operation of Section 63c did not give rise to any enforceable obligation before May 9, 1980. (A-12-13). This analysis is wholly consistent with the principles articulated by this Court in *Hicks* v. *Guinness*.

Conclusion

For the foregoing reasons, the petition for writ of certiorari should be denied.

Respectfully submitted,

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